Supreme Court, U.S.
FILED
SEP 29 1995
CLERK

95-534

No. 95-355

In the
Supreme Court of the United States
October Term, 1995

Douglass G. Lundman, as trustee
for the next of kin of Ian
Douglass Lundman, deceased,

Cross-Petitioner,

vs.

The First Church of Christ, Scientist
and James Van Horn,

Cross-Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA COURT OF APPEALS

CROSS–PETITION FOR A WRIT OF CERTIORARI

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1995 – Bachman Legal Printing ■ (612) 339-9518 ■ FAX (612) 337-8053

32 pp

QUESTION PRESENTED

Does the appellate factfinding of the lower court improperly create a higher evidentiary standard for religious organizations and their agents in violation of the Establishment Clause?

PARTIES TO THE PROCEEDING

Seven parties were defendants in the district court and appellants in the Minnesota Court of Appeals: Kathleen McKown; William McKown; Mario Tosto; Quinna Lamb; Clifton House, Inc.; The First Church of Christ, Scientist; and James Van Horn. Because the judgments against Ms. McKown, Mr. McKown, Mr. Tosto, and Ms. Lamb were sustained by the court of appeals, these parties filed the original petition for a writ of certiorari with this Court. This cross-petition is directed at Mr. Van Horn and The First Church of Christ, Scientist.

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PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA COURT OF APPEALS

CROSS–PETITION FOR A WRIT OF CERTIORARI

Cross-Petitioner Douglass G. Lundman respectfully petitions for a writ of certiorari to review the judgment and opinion of the Minnesota Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Minnesota Court of Appeals is reported at 503 N.W.2d 807 and is reproduced in Petitioners' Appendix to Petition for a Writ of Certiorari at 1a-64a.[1] The unpublished district court opinion is reproduced in Pet. App. at 65a-125a.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 1995. On May 31, 1995, the Minnesota Supreme Court denied a petition for review. Cross-Petitioner was served with the original petition for a writ of certiorari on August 30, 1995.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

First Amendment, United States Constitution:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . .

STATEMENT OF THE CASE

Mr. Lundman does not controvert Petitioners' chronology of this case. He believes, however, that it will be helpful to this Court if Petitioners' statement of the case is supplemented with a more specific statement of the role played by Mr. Van Horn and

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[1] Citations for Petitioners' Appendix will hereinafter be made as "Pet. App. at --". Similarly, citations to the original petition for a writ of certiorari will be made as "Pet. at --".

The First Church of Christ, Scientist (First Church) in the death of Ian Lundman.[2]

I. BACKGROUND FACTS

On May 9, 1989, eleven-year-old Ian Lundman died of complications caused by juvenile on-set diabetes because he received Christian Science treatment in lieu of the routine medical assistance that could have easily saved his life. (T. 7/21 63.)[3]

Christian Science is a religious denomination founded by Mary Baker Eddy in 1879. *United Christian Scientists v. Christian Science Bd. of Directors*, 829 F.2d 1152, 1154 (D.C. Cir. 1987). Its basic premise is the belief that physical ailments are "errors of the mind" that can be cured through prayer. (T. 7/28 23); *see also Walker v. Superior Court*, 763 P.2d 852, 852 n.1 (Cal. 1988), *cert. denied*, 491 U.S. 905 (1989). Its followers therefore do not believe in the use of medicine to treat minor illnesses. (T. 7/23 112.) This health-care system is funded through donations, gifts and legacies from members, insurance

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[2] Besides the one-paragraph summary of the role played by Ian's mother and stepfather, the original petition for a writ of certiorari's description of Ian's suffering is limited to the following:

> [W]hen Ian's condition has not improved, Kathy [McKown] retained petitioner Mario Tosto, a Christian Science practitioner, to pray for Ian, and later obtained the services of petitioner Quinna Lamb, a Christian Science nurse, to attend to Ian's physical comfort. Despite their efforts, less than three days after his initial complaint, Ian died at home.

Pet. App. at 3.

[3] The facts pertinent to this cross-petition are cited as "(T. month/day page)". The date reference is necessary because the trial transcript is not consecutively numbered.

company payments, and Medicare and Medicaid. (T. 7/23 5; 7/27 138-39; 8/6 55-56; 8/10 300-01.)[4]

First Church, which is located in Boston, Massachusetts, is the head of this religious denomination that has established a system for providing Christian Science treatment to seriously ill children. (Ex. 45); *see also Nemark v. Williams*, 588 A.2d 1108, 1110 n.2 (Del. 1991). This treatment is provided through a national Manager of Committees on Publication (Manager), local Committees on Publication (CoP), and Christian Science nurses and practitioners.

A local CoP is actually a one-person committee who reports to the Manager. *See generally Massachusetts v. Twitchell*, 617 N.E.2d 609, 612 n.3 (Mass. 1993). CoPs, who serve as First Church's "trusted representatives," are located in every state and there are 170 such people globally. (T. 8/6 142.) The CoP's role is detailed in the *Handbook on Policies and Procedures on Publication* (CoP Handbook). This handbook instructs parents to contact their local CoP if their ill children are not improving because the CoP can "help determine a proper course of action which will protect the individual involved as well as our cause." (T. 8/9 95.) Thus, once contacted, the CoP provides treatment and legal advice over the telephone to the people directly caring for the ill child. (T. 8/9 19-21.)

First Church controls the practitioners and nurses who directly care for seriously ill children by certifying their training, by listing them in the *Christian Science Monitor*, and by encouraging members to retain only "journal-listed" nurses and practitioners. Journal-listed practitioners and nurses are thus individuals who have given evidence to First Church of their

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[4] Petitioners make outlandish claims regarding the effectiveness of Christian Science treatment. (Pet. at 6-7.) Not only were these claims excluded at trial, they are inaccurate. Despite the fact that First Church will not report the number of children treated exclusively by Christian Science treatment, it is clear that the measles rate, for example, is very elevated among Christian Science children. (Swan Aff.)

moral character and "healing ability." (T. 8/4 20-21; 8/9 48-49.) Failure to rely exclusively ("radically") upon Christian Science treatment can cost a nurse or practitioner their journal listing. (T. 8/9 42.)

Like parents, journal-listed nurses and practitioners are instructed by First Church to contact the CoP in certain cases involving children. Practitioners then pray for the child and conduct a "healing." Nurses provide "practical care" and communicate their young patient's physical symptoms (i.e., those apparent to the human senses) to the practitioner. (T. 7/23 124.)

II. FACTS OF THIS CASE

Ian Lundman's symptoms became apparent at least four days before his death. (T. 8/5 121.) On Friday, May 5, 1989, Ian's teacher noticed Ian's lethargy and a fruity odor on his breath--both classic symptoms of diabetes. (T. 7/21 21; 8/5 121-22.). For the next two days, Ian's mother, Kathleen McKown, attempted to treat her son by, among other things, giving him breath mints to mask the persistent fruity odor. (T. 7/26 82.) Ian's condition continued to deteriorate. (7/26 82.)

By that Sunday Ms. Lundman was sufficiently concerned to terminate her own care and turn to the services of a journal-listed practitioner named Mario Tosto. (T. 7/26 84-85.) Ian (who was too young to be a member of First Church) attended Sunday school that day and later met briefly with Mr. Tosto, who gave him a prayer to recite. (T. 8/4 72, 97-99.)

Although his condition worsened considerably over the next twenty-four hours, no one asked Ian, who had earlier sought out a medical nurse at his school (T. 8/6 85), or his non-custodial father, a non-Christian Scientist who had previously provided his son with medical care (T. 7/29 72), what kind of treatment was most appropriate. (T. 7/22 100; 7/26 25, 93; 8/3 54; 8/4 97-98.) Instead, after watching her son vomit approximately five times in less than two hours on Monday morning (T. 7/26 98-99), Ms.

McKown followed the written directives of First Church and contacted James Van Horn, the Minnesota CoP. (T. 7/26 100; Ex. 45; Ex. 25.) Mr. Van Horn then informed the Manager about the seriously ill child. (T. 8/6 156-57.)

By Monday evening Ian was no longer responding to other people. (T. 7/20 164.) Ms. McKown called a Christian Science nursing service, Clifton House, Inc., and arraigned for Quinna Lamb (now Giebelhaus), a Christian Science nurse, to be dispatched to the McKowns' house. (T. 8/5 17.) Upon her arrival, Ms. Lamb was forced to place a plastic baggie on her young patient to collect his uncontrollable flow of urine. (T. 7/22 76-77.) She then reported Ian's condition to Mr. Van Horn; the third such phone call to the CoP. (T. 8/6 160-63.)

Several hours after Ms. Lamb's arrival it finally became apparent to Ian's caregivers that the Christian Science treatment was not working and that their patient was dying. (T. 7/20 134-36; T. 7/23 52-54.) But they did not call 911 until nearly thirty minutes after Ian stopped breathing. (T. 7/26 135.) One of the first officers on the scene described Ian's body as "very fragile, like he had lost weight recently, very skinny, and just basically to tell you the truth, didn't even look human." (T. 7/30 132.)

III. PROCEEDINGS BELOW

In April 1991, Mr. Lundman, as trustee of Ian's estate, commenced this wrongful death action against seven defendants: Ms. McKown, Mr. McKown, Mr. Tosto, Ms. Lamb, Clifton House, First Church, and Mr. Van Horn. Following a seven-week trial held in the summer of 1993, the jury found all of the defendants negligent and apportioned compensatory damages of $5.2 million among the parties. The same jury then awarded $9 million in punitive damages against First Church alone. The district court remitted the compensatory damages to $1.5 million. Judgment was entered on April 1, 1994. (Pet. App. at 66a.)

On appeal, in a decision filed on April 4, 1995, a split Minnesota Court of Appeals overturned the punitive damages award and held that neither Mr. Van Horn, First Church, nor Clifton House owed a duty to Ian. (Pet. App. at 60a.) The Minnesota Supreme Court denied further review. (Pet. App. at 127a.)

REASONS FOR GRANTING THE PETITION

I. THIS CASE PRESENTS UNRESOLVED CONSTITUTIONAL QUESTIONS ABOUT THE CHRISTIAN SCIENCE TREATMENT OF CHILDREN

The question of whether the First Amendment shields religious faith healers and their church from tort liability for causing the death of a child has yet to be addressed by this Court. Indeed, this case involves the first civil jury verdict against Christian Scientist spiritual healers. As such, it raises important questions of first impression.

The conflict found in this case between religious freedom and the state's power *parens patriae* is substantial. This Court has observed that "[t]he right to practice religion freely does not include liberty to expose the community or the child to communicable disease *or the latter to ill health or death.*" *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944) (citation omitted) (emphasis added). Limiting religious liberty in this manner is necessary because the protection of powerless children is a governmental interest "of the highest order." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

This substantial conflict is likely to reoccur because First Church and other religious organizations holding similar beliefs are active accross the country. For example, the *Christian Science Journal* lists the names of several thousand practitioners and nurses who are engaged in approved faith healing.

Moreover, First Church is actively encouraging reliance upon its methods by electing to enjoy benefits such as federal funding from Medicare and reimbursement from private health insurance companies. *See generally* Ivy B. Dodes, Note, *"Suffer the Little Children . . ." Toward a Judicial Recognition of a Duty of Reasonable Care Owed Children by Religious Faith Healers*, 16 Hofstra L. Rev. 165 (1987).

The results of First Church's self-promotion are evident in the nation's courts. Parents have been successfully prosecuted for allowing their children to die through prayer treatment. *See, e.g., Walker v. Superior Court*, 763 P.2d 852, 873 (Cal. 1988), *cert. denied*, 491 U.S. 905 (1989). At least one other civil suit is pending against First Church and its agents for their treatment (or lack thereof) of seriously ill children. *Quigley v. First Church of Christ, Scientist*, Nos. G016980 & G017471 (Cal. Ct. App.). A decision from this Court is needed to clear the confused legal landscape surrounding the Christian Science treatment of children.

II. THE DECISION BELOW VIOLATES THE ESTABLISHMENT CLAUSE BY CREATING A HIGHER EVIDENTIARY STANDARD IN NEGLIGENCE ACTIONS AGAINST RELIGIOUSLY MOTIVATED DEFENDANTS

It is unfortunate that, as it stands now, the decision by the Minnesota Court of Appeals is the nation's leading case on the duty of a religious organization and its officials to a seriously ill child. The decision is unworthy of this status because the court engaged in improper appellate factfinding that raises the evidentiary burden of a plaintiff seeking to hold a church and its decision makers liable in a negligence action.

Courts have repeatedly recognized that the separation of church and state does not place churches "above the law" and immunize their tortuous conduct. *See, e.g., Rayburn v. General*

Conference of Seventh-Day Adventists, 772 F.2d 1164, 1171 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986). Indeed, even the decision below pays lip service to this well-established principle. (Pet. App. at 26a.) But the decision fails to truly acknowledge the fact that lawsuits against religious tortfeasers are not to be conducted in a manner different from other civil suits. That is, when the State, through its courts, serves as the arbitrator of such a case, it must remain neutral while applying neutral principles of law. *See, e.g., Jones v. Wolf*, 443 U.S. 595, 603-04 (1979); *Christofferson v. Church of Scientology*, 644 P.2d 577, 600-03 (Or. Ct. App. 1982), *cert. denied*, 459 U.S. 1227 (1983).

The decision below is not the product of a constitutionally required neutral arbitrator; rather, the appellate court's selective reading of the record is biased in favor of the religious organization over the secular individual. The resulting creation of a higher evidentiary standard violates the neutrality guarantee of the Establishment Clause.

The Establishment Clause, which is made applicable to the States through the Fourteenth Amendment, *see Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), is designed to "compel the State to pursue a course of neutrality toward religion." *Board of Educ. v. Grumet*, 114 S. Ct. 2481, 2497 (1994) (citation omitted). Thus, as this Court has recognized many times, the neutrality principle forecloses religious favoritism as a motivation for governmental action. *See, e.g., Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

The failure of the court of appeals to exercise judicial authority in a religiously neutral manner is evident in its holdings that the punitive-damages award against First Church is unconstitutional and that Mr. Van Horn and First Church did not owe a duty to Ian Lundman.

A. The lower court's reversal of the punitive damages was the product of religious favoritism

The court of appeals gave "three independent reasons" for reversing the punitive damages imposed by the jury: lack of an agency relationship with the direct healers (discussed *infra*); unconstitutionality under the First Amendment; and a lack of evidence that First Church acted in bad faith. (Pet. App. at 22a-25a.) A close reading of the opinion, however, reveals that there were not three independent reasons; rather, the entire holding was infected by the court's First Amendment analysis. The court's official syllabus demonstrates this infection by only listing religious liberty as the reason for reversing the imposition of punitive damages. (Pet. App. at 13a-14a.)

The lower court based its First Amendment analysis on the conclusion that the award intruded too deeply into the "forbidden field of religious freedom." (Pet. App. at 24a.) But, of course, religiously based conduct is not immune from otherwise valid and neutral laws. *Employment Div. v. Smith*, 494 U.S. 872, 878-79 (1990); *Reynolds v. United States*, 98 U.S. 145, 147 (1878).[5] The punitive damages punished First Church's conduct. After all, the Church and its agents sought to *cure* Ian, not to *teach* him religious doctrine.

There are many things that this case is *not* about: it is not about the right of competent adults to radically rely on spiritual treatment; it is not about the right of adults to help a sick child exercise his or her own First Amendment rights (no one even asked Ian about his beliefs); it is not even a case where adults

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[5] It is worth observing that Petitioners base much of their petition for a writ of certiorari on the least restrictive means test. (Pet. at 10-20.) As a matter of federal law, however, this test only applies because of Religious Freedom Restoration Act, 42 U.S.C. § 2000bb. Petitioners' argument is seriously undermined by the fact that a federal court recently held the Act is an unconstitutional attempt to overrule the *Smith* decision. *Flores v. City of Boerne*, 877 F. Supp. 355, 358 (W.D. Tex. 1995).

considered various medical opinions and made an informed decision in the best interest of the child. *See generally Cruzan v. Missouri Dept. of Health*, 497 U.S. 261, 280 (1990); *Newmark v. Williams*, 588 A.2d 1108, 1120 (Del. 1991). This case is only about the right of institutions and affiliated individuals to act exclusively on the basis of their own religious beliefs. Such *conduct* is undeserving of First Amendment protection or else we would allow Abraham to freely sacrifice his son Isaac as a testament to religious fealty.

As with much of the lower court's decision, improper appellate factfinding is the engine driving its holdings. The court of appeals reached the remarkable conclusion that it was "unchallenged [at trial] that all defendants, including the Church, acted in good faith." (Pet. App. at 25a.) This inaccurate determination permitted the court to conclude that there was no statutory justification for the imposition of punitive damages.

In reality, Mr. Lundman presented ample evidence from which the jury could conclude that First Church officials knowingly placed Ian in a life-threatening situation. For example, the CoP handbook, which was introduced into evidence, details how parents and other caregivers are to tell secular authorities as little as possible about an ill child's condition. Other evidence supporting the jury's conclusion that First Church acted with deliberate disregard for Ian's safety included, among other things, the fact that an agent continued to pray for Ian with the knowledge that this course of conduct foreclosed medical treatment and the fact that another agent, Mr. Van Horn, discouraged disclosing Ian's illness to the proper authorities

By ignoring this evidence the lower court was also able to ignore the applicable standard of review; namely, that a verdict should be overturned only when manifestly and palpably contrary to the evidence considered in the light most favorable to the verdict. *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982). This disregard for both proper appellate factfinding and the correct standard of review caused the court to surrender its

neutrality. The resulting decision favored the sectarian party over the secular one and thereby advanced religion in violation of the Establishment Clause.

B. The lower court violated the principle of religious neutrality by substituting its own interpretation of the evidence regarding the duty owed by Mr. Van Horn and First Church

The lower court improperly substituted its own factual determinations regarding the role played by Mr. Van Horn and First Church in Ian's treatment. In so doing, the court rendered the jury's verdict an empty gesture with its unauthorized *de novo* review. As the dissent observed, there was more than sufficient evidence in the record to support the jury's conclusion that Mr. Van Horn and First Church owed a duty of care to Ian. (Pet. App. at 60a-64a.)

1. Mr. Van Horn held himself out as an advisor and exercised authority over Ian's well-being

The fundamental flaw with the lower court's analysis of the role played by Mr. Van Horn is symptomatic of its larger failure to remain a neutral arbitrator; it failed to undertake a balanced examination of First Church's health care system. If it had done so, the court would have reached a conclusion that is undisputed by any of the parties: Mr. Van Horn essentially embodies the Minnesota branch of First Church. As CoP, he is the religious organization's "trusted representative" responsible for implementing its policy on healing. To these ends, he directly interacts with the Manager, local nurses and practitioners, and the parents of ill children pursuant to explicit, written policies.

The trial court was presented with these facts, along with Mr. Van Horn's conduct when Ian was seriously ill, and determined that he had assumed a duty of care toward the child

because of his "considerable power over Ian's welfare." (Pet. App. at 77a.) The court of appeals reversed this ruling by relying on a highly selective reading of the record. Among the facts improperly excluded from the court's analysis are the following:

- Mr. Van Horn was the person responsible for implementing First Church policy in Minnesota;
- As CoP, he held himself out as a legal *and* medical advisor;
- He knew from the beginning that Ian's poor health was not improving because he was contacted by Ms. McKown pursuant to First Church policy;
- He accepted the responsibility of remaining in constant contact with Ian's direct caregivers;
- He knew that by virtue of his powerful position within First Church's hierarchy that those caregivers were relying on his continuous advice; and
- He helped insulate Ian from the intervention that would have saved the child's life.

As with its analysis of the punitive damages, the lower court sabotaged the appropriate standard of review by engaging in improper appellate factfinding. The court's failure to take into account the central role of the CoP, despite the abundant evidence presented at trial by Mr. Lundman, raised the evidentiary hurdle that secular plaintiffs must clear when they initiate litigation against the conduct of religious officials. The Establishment Clause does not permit this skewing of the civil justice system in favor of religious actors.

2. The lower court ignored First Church's highly defined polices and procedures for treating children

At trial Mr. Lundman presented a great deal of evidence outlining First Church's hierarchy and its written polices regarding the treatment of seriously ill children by nurses, practitioners, and the CoP. For example, First Church certifies nurses and practitioners by listing them in the *Christian Science Journal* after they have met certain stringent requirements. Because First Church encourages its members to regain only journal-listed healers, Christian Science nurses and practitioners have no career possibilities if they are not journal-listed.

The jury examined this evidence and found by a special verdict that Mr. Van Horn, Mr. Tosto, and Ms. Lamb were agents of First Church. Such a verdict can only be set aside on appeal if it is "perverse and palpably contrary to the evidence." *Hanks v. Hubbard Broadcasting, Inc.*, 493 N.W.2d 302, 309 (Minn. Ct. App. 1992). Yet the court managed to do so by ignoring First Church's highly defined polices and procedures in favor of a vague discussion about the religious organization's freedom to espouse its beliefs. Perhaps no portion of the court's decision better illustrates its lack of impartiality than its observation that "a church is not a lawn-mower manufacturer that can be found negligent in a products liability case for failing to affix a warning sticker near the blade." (Pet. App. at 44a.)

In the final analysis, the court of appeals ignored what gives this case national significance and makes it worthy of this Court's attention. First Church is not a small religious sect; it is a multimillion dollar national organization that receives federal benefits. As such, it has developed written policies and procedures that govern how children are treated by people who rely on First Church for their livelihood. It was these polices and economic dependence that caused the Church to assume a duty to

Ian Lundman. By ignoring these facts, the lower court's decision advanced First Church at the expense of Ian.

CONCLUSION

For the foregoing reasons, the cross-petition for a writ of certiorari should be granted.

Dated: September 28, 1995

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